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82-740

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SHEARN MOODY, JR.,

Petitioner,

v.

STATE OF ALABAMA ex rel.
THARPE FORRESSTER, COMMISSIONER OF
INSURANCE OF THE STATE OF ALABAMA

and

PROTECTIVE LIFE INSURANCE CO.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTION PRESENTED

Does a state court injunction against a citizen's filing a federal *in personam* civil action for damages, on the ground that the federal action is "connected with" and would be an "interference" with a state court proceeding, but when the federal action would not and cannot disturb the state court's control of property or any *res*,

(1) violate the rule announced by this Court in *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964), forbidding such injunctions?

(2) encroach on the jurisdiction of the federal courts in violation of Article III and the Supremacy Clause (Article VI) of the Constitution?

(3) abridge the right of petitioner to petition the courts for redress of grievances, in violation of the First Amendment?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Shearn Moody, Jr., hereby petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama denying his petition for a writ of mandamus in this case.[1]

OPINIONS BELOW

The opinion of the Supreme Court of Alabama issued July 30, 1982, is reproduced as Appendix A. The opinion of the Circuit Court of Jefferson County, Alabama, issued February 5, 1982, is reproduced as Appendix B.

[1]The caption of the case in this Court contains the names of all the parties. Hon. William C. Barber, Judge, Circuit Court of Jefferson Couty, was a nominal party below as respondent to the petition for a writ of mandamus.

JURISDICTION

The judgment and opinion of the Supreme Court of Alabama were issued on July 30, 1982. This Court has jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III:

Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . .

Article VI, Cl. 2:

This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

First Amendment:

Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.

Fourteenth Amendment:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Summary

This case presents the issues of one individual's loss of his right to access to the federal courts and of the power of the states generally to restrict access to the federal courts.

This Court strictly limits a state's power to enjoin a citizen from commencing federal litigation. *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964), applying *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 466 (1939), applied in *General Atomic Co. v. Felter*, 434 U.S. 12 (1977). A state may enjoin federal litigation only in the narrowest of circumstances; that is, (1) when a state court or its officer has possession of property pursuant to *in rem* proceedings, and (2) when the federal litigation also is *in rem* or *quasi in rem*, and would or could have the federal "court, or its officer," wrest "possession or . . . control" of that property from the state court. *Princess Lida*, 305 U.S. at 466. But a state court may not enjoin federal litigation that is only *in personam*, that is, which seeks only money damages and does not seek to disturb a state court's jurisdiction over or possession of a *res*. It may not do so even if the federal case seeks to relitigate issues already decided in the state court, or even if the federal case is deemed vexatious or harassing. *General Atomic*, 434 U.S. at 15, 17; *Donovan*, 377 U.S. at 412.

The Alabama Supreme Court decision petitioner asks this Court to review denied him the right to bring a purely *in personam* action in the federal courts of Texas. The Alabama decision did not find that petitioner's proposed lawsuit (App. C) was *in rem* or *quasi in rem*. It did not find that petitioner's lawsuit would or could have the federal "court, or its officer" take "possession or . . . control" of property in control of the state court. Instead Alabama forbids petitioner to file a lawsuit that, it recognized, sought only money damages, on the ground that it was "inextricably connected with the . . . receivership" and that therefore to permit it "would be an interference with the receivership." App. A pp. 1, 2.

The issue is especially important here because thirty-two other states now have insurance receivership statues like Alabama's, which broadly permit injunctions against litigation. App. D. Like Alabama's, none of these statutes limit their reach to what is permitted by *Donovan v. City of Dallas*. Alabama's "connected with" and "interference" test encompasses much that would in no way disturb the state court's "control" or "possession" of the *res*, the assets of the company subject to receiver-

ship. Under all 33 statutes, any federal court *in personam* action for damages arising from acts "connected" with an insurance receivership (for example, as in this case, an alleged conspiracy to reduce competition in the insurance business (App. C p. C11)), could be construed as a potential "interference" with the receivership.[2]

The Alabama Supreme Court decision here rewrites the *Donovan* rule without even citing it. If let stand, it presages a wholesale jettison of *Donovan* in a significant realm of litigation. *See* App. E. If state power is to be expanded in this way, if citizens' access to the courts is to be restricted in this way and if the power of federal courts to determine their own jurisdiction is to be reduced in this way, it should be only after full and careful consideration by this Court.

* * *

Petitioner has sought review of Alabama's injunction against his institution of litigation on earlier occasions. On those occasions the *Donovan* issue either was muddied with other issues and was not clearly presented on the merits[3] or was raised

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[2] *See* 5 Oxford English Dictionary 395 (1933 ed., 1970 Repr.):

> **Interference.**
>
> 1. The action or fact of interfering or intermeddling (*with* a person, etc., or *in* some action). (emphasis in original)
>
> * * *
>
> **Interfere.**
>
> * * *
>
> 2. Hence, of things generally: To strike against each other; to come into physical collision; to collide or clash, so as to hamper or hinder each other: to get in each other's way, cross each other's path.
>
> * * *
>
> 4. a. Of things, actions, etc: To come into collision or opposition, so as to affect the course of.
>
> b. Of persons: To meddle *with;* to interpose and take part in something, esp. without having the right to do so; to intermeddle. (emphasis in original)

[3] Moody v. State ex rel. Payne, 355 So.2d 1116 (Ala.), *cert. denied,* 439 U.S. 910 (1978); Moody v. State ex rel. Payne, 351 So.2d 552

in collateral proceedings brought under the Full Faith and Credit clause,[4] and in each case the court at least purported to follow *Donovan*.[5] In the decision of which review is now sought, the *Donovan* issue is squarely presented, is the only issue presented, and the Alabama Supreme Court has forgone even lip service to the *Donovan* rule.

Proceedings Below

Petitioner is a citizen and resident of Texas. He is the principal stockholder and was the president of the Empire Life Insurance Company of America ("Empire"), an Alabama insurance company doing business in interstate commerce. In 1972 the Circuit Court for Jefferson County, Alabama, placed Empire in receivership. In 1974 the court ordered Empire liquidated and turned over its assets and its insurance in force to Protective Life Insurance Company, which had been a competitor of Empire.

On January 6, 1975, at the receiver's instance, the circuit court enjoined petitioner from "filing, financing, sponsoring, initiating, or aiding in whole or in part, in any way the filing of any lawsuit, complaint or legal claim, or any amendment to any complaint or legal claim in any court . . . on behalf of any party" against the receiver, the receivership, or with respect to any claim affecting the affairs of Empire Life or the receivership without first obtaining the circuit court's permission. On appeal the Alabama Supreme Court expressly acknowledged the authority of *Donovan*, but found that petitioner's suit was attempting to remove possession of the *res* from the receivership court. *Moody v. State ex rel. Payne*, 329 So.2d 73, 78, 80 (Ala. 1976).

Meanwhile, in April 1975, the circuit court found petitioner in violation of its injunction for aiding an Empire policyholder

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(Ala. 1977), *cert. denied*, 435 U.S. 964 (1978); State ex rel. Payne v. Empire Life Insurance Co., 351 So.2d 538 (Ala. 1977), *cert. denied*, 435 U.S. 969 (1978); Moody v. State ex rel. Payne, 329 So.2d 73 (Ala. 1976).

[4]Sumrall v. Moody, 620 F.2d 548 (5th Cir. 1980), *on reh.*, 632 F.2d 1351 (5th Cir. 1980), *cert. denied sub nom.* Moody v. Forresster, 450 U.S. 1026 (1981).

[5]*See* discussion at pp. 5-6, *infra*.

to amend a complaint the policyholder had filed against the receiver in federal court,[6] and fined him $250,000 (payable as "damages" to the receiver and Protective). *Moody v. State ex rel. Payne*, 355 So.2d 1116 (Ala.), *cert. denied*, 439 U.S. 910 (1978); *see also State ex rel. Payne v. Empire Life Insurance Co. of America*, 351 So.2d 538 (Ala. 1977), *cert. denied*, 435 U.S. 969 (1978). The receiver and Protective successfully sued petitioner to collect the $250,000, the Fifth Circuit holding that the full faith and credit clause controlled and that *Donovan* was satisfied.[7] *Sumrall v. Moody*, 620 F.2d 548 (5th Cir. 1980),[8] *on reh.*, 632 F.2d 1351 (5th Cir. 1980), *cert. denied sub nom. Moody v. Forresster*, 450 U.S. 1026 (1981).

In 1976, the Circuit Court denied petitioner's request for permission to file a federal civil action. On appeal, the Alabama Supreme Court held that "the proposed litigation was nothing more than [a] ploy of Moody's to interfere with, delay and eventually stop the Empire receivership proceeding", the proposed federal case "inextricably involve[d] the Empire receivership proceeding," and therefore the *Donovan in rem* exception applied. *Moody v. State ex rel. Payne*, 351 So.2d at 555.[9]

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[6]Allmon v. Bookout, Civ. No. 74-377-N (M.D. Ala.).

[7]*Allmon* sought injunctive relief which, the Fifth Circuit found, "if granted as sought, the receivership would have been terminated, *and possession of all assets of Empire would have been taken away from the Receiver.*" 632 F.2d at 1352 (emphasis added).

[8]The Fifth Circuit also expressed impatience with what it regarded as petitioner's excessive zeal in pursuing in the courts vindication of what he has viewed as unconstitutional action to deprive him of constitutional rights. 620 F.2d at 550-51, nn. 1, 2.

[9]In that case the Circuit Court at first had permitted petitioner to file a counterclaim against the receiver and Protective in an action then pending in a Texas federal court, Meyers v. Moody, C.A. Nos. 3-5678-D, 3-7625-D (N.D. Tex.). After that district court refused to allow the counterclaim to be filed, petitioner requested the Circuit Court's permission to file the same claim as an original action. Citing the federal court's ruling on the counterclaim, the Circuit Court denied permission to file the original action. Thus the federal court had been given and had exercised the opportunity to decline to entertain the federal action, and the state court merely followed suit.

Thereafter the receivership proceeded apace. Protective has absorbed all the assets of Empire and all its life insurance policies in force.[10] Moratoriums on cash surrender value of Empire policies, imposed in 1974 as part of Protective's assumption of the policies and receipt of Empire's assets, had been reduced from $14 million to $1.7 million by the end of 1981 and will have been eliminated altogether by the end of 1982. The eggs have been scrambled, and no lawsuit petitioner could conceive would unscramble them.

There remain, however, petitioner's claims for damages for loss of civil and property rights in violation of the Constitution, federal statutes and the common law. *See* App. C pp. C10, C11. Accordingly, and mindful of the Alabama Supreme Court's expansive construction of *Donovan's* exception for *in rem* actions, petitioner once again sought the circuit court's permission to file a federal civil action.

The proposed complaint stated federal causes of action under the Constitution and the Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985; the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.*, and the Racketering In Corrupt Organizations Act, 18 U.S.C. § 1964(c); and a state law conspiracy claim. It sought only money damages, against nine individual defendants, one corporate defendant, and the State of Texas pursuant to express legislative waiver of sovereign immunity. It did not pray for any relief that would affect the ongoing receivership proceedings or any assets in the possession of the receiver or the court, and named neither

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[10]There is therefore no *res* in the state court's possession which any civil action could affect. Indeed, the only activity in the receivership proceeding in the last few years has been the Receiver's applications for fees and petitioner's efforts to obtain permission to institute litigation. Despite several invitations below, respondents receiver and Protective were unable to specify a single remaining activity of the receivership which petitioner's proposed action could obstruct or affect. Moody v. Barber, No. 81-502 (S.Ct. Ala.), Pet. for Mandamus (March 18, 1982) at 12; Pet.'s Br. in Reply to Respondents' Answers and Brief in Opposition to Petition for Mandamus (April 20, 1982) at 8.

the current receiver nor the receivership court as defendants. In short, it was the type of purely *in personam* federal litigation which this Court held in *Donovan* to be immune from state court interference. Indeed, it raised some claims cognizable only in the federal courts. Petitioner urged that to deny him permission to file this complaint would violate *Donovan* and deprive him of his constitutional rights.

The circuit court nevertheless denied permission to file the complaint. App. B. It did not address the *Donovan* issue at all. Instead it declared that *it* had "previously and finally adjudicated" the claims made in the proposed complaint (even though some of those claims, *e.g.*, under the federal antitrust and anti-racketeering statutes, can only be brought in federal court), thus usurping the federal court's function and duty to decide issues of its own jurisdiction. App. B p. B2 (¶ 3, 4). It harped on petitioner's persistent efforts to obtain judicial relief, in Alabama or anywhere, for deprivation of his civil and property rights, calling this "harassing and vexatious litigation". *Id.* (¶ 8).

Petitioner asked the Alabama Supreme Court for a writ of mandamus (the only avenue for review). Again he urged that the injunction as applied to his proposed lawsuit violated *Donovan* and the Constitution. Without oral argument, in a one-and-a-half page opinion containing neither analysis nor citation (and like the Circuit Court, quite ignoring the *Donovan* rule), the Alabama Supreme Court denied the petition:

> From our review of Moody's complaint, and the evidence submitted by him in support of his mandamus petition, and the answer of Judge Barber, we conclude that the proposed civil action for damages is inextricably connected with the Empire receivership. To permit the suit would be an interference with the receivership and therefore mandamus is denied.

App. A p. A2. The decision thus holds that no more than the existence of a common ground of subject matter between the federal litigation and the state proceedings is enough to justify an injunction against prosecution of a federal *in personam* civil action for damages.

REASONS FOR GRANTING THE WRIT

1. Alabama has Ruled in this Case that Federal Litigation may be Enjoined if it is "Connected With" and hence might "Interfere" With a State Receivership Proceeding, Even Though the Federal Lawsuit is *In Personam* and Cannot Affect Property within the Possession or Control of the State Court. The Alabama Rule Conflicts Squarely with the Rule of Decision this Court Announced in *Donovan v. City of Dallas.*

If allowed to stand as precedent, the decision below will carve a new exception to the general rule that state courts may not enjoin federal litigation or disable citizens of the United States from vindicating their rights and pursuing their claims in the courts of the United States that Article III of the Constitution established for all the people. *Donovan v. City of Dallas,* 377 U.S. 408 (1964); *General Atomic Co. v. Felter,* 434 U.S. 12 (1977); *General Atomic Co. v. Felter,* 436 U.S. 493 (1978).

Donovan is a watershed decision. It distilled the holdings of a long line of earlier cases, and has been relied on since as the landmark authority for restraints on state prohibitions against federal civil litigation. *Donovan* holds that "state courts are completely without power to restrain federal court proceedings in *in personam* actions," 377 U.S. at 413,[11] with a single, narrow

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[11]The petitioners in *Donovan* were seeking to relitigate in federal court the same issues that some of them had already litigated, and lost, in the state courts. Thus even *res judicata* was not enough to bar them from the federal court or to prevent the federal court from determining the *res judicata* issue for itself. As *General Atomic* characterized it:

> . . . *Donovan* presented as compelling a case as there could be for permitting a state court to enjoin the further prosecution of vexatious federal proceedings. It involved a suit filed in federal court after the issuance of a final state-court judgment deciding the principal claims pressed in the federal action adversely to the federal plaintiffs. Moreover, . . . the pendency of the federal action had the effect of rendering the state court judgment ineffective,

exception: a state court that has acquired custody over property may enjoin federal litigation that would require the federal court's officers (e.g., the United States Marshals) to take physical custody and control of the same property, *id.* at 412. In this, *Donovan* followed and cited *Princess Lida of Thurn and Taxis v. Thompson,* 305 U.S. 456, 466 (1939):

> . . . it is settled that where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other. On the other hand, if the *two suits* are in rem, or quasi in rem, so that the court, *or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause* and grant the relief sought the jurisdiction of the one court must yield to that of the other.[12] (emphasis added; footnote omitted).

This Court applied and extended *Donovan* in *General Atomic Co. v. Felter,* 434 U.S. 12 (1977), holding that the *in rem* exception was properly invoked only to prevent an unseemly tug-of-war between two courts seeking to assert physical control over the same *res.*[13] This Court held unequivocally:

> because Texas law provided that the bonds could not be issued while litigation challenging their validity was pending. *We nevertheless overturned the state-court injunction.*

434 U.S. at 17 (emphasis added).

[12] *Accord,* United States *ex rel.* Riggs v. Johnson Cty., 73 U.S. (6 Wall.) 166, 195 (1868) ("state courts are . . . destitute of all power to restrain either the process or proceedings in the National courts").

[13] *See* Markham v. Allen, 326 U.S. 490, 494 (1946); Freeman v. Howe, 65 U.S. (24 How.) 450 (1861). The courts have consistently noted that the *in rem* exception is the sole exception to the *Donovan/Princess Lida* principles and, indeed, that the exception should be narrowly construed. Until now, the states have been powerless to preclude *in personam* federal litigation. *See, e.g.,* Markham v.

> We reverse because under *Donovan v. City of Dallas* it is not within the power of state courts to bar litigants from filing and prosecuting *in personam* actions in the federal courts.

General Atomic Co. v. Felter, 434 U.S. at 12 (citations omitted). This Court rejected the notion, which the courts below relied on here, App. B p. B2 (¶ 8), that injunctions may issue to forestall "vexatious and harassing litigation." *General Atomic*, 434 U.S. at 16. The Court rejected arguments that state court injunctions may prevent federal courts from exercising concurrent subject matter jurisdiction, or may prevent federal courts from adjudicating legal issues also involved in state proceedings. *Id.* This Court's instructions to all state courts were unambiguous: "The right to pursue federal remedies . . . may no more be restricted by a state court here than in *Donovan*. The Federal courts are fully capable of preventing their [own] misuse for purposes of harassment." *Id.* 18-19. Following this Court's mandate, the district court in *General Atomic* rewrote the injunction to permit "all *in personam* actions in Federal Courts . . . ." *General Atomic Co. v. Felter*, 436 U.S. 493 (1978).[14]

In this case Alabama has effectively overruled *Donovan* and *General Atomic*, without so much as troubling itself to cite,

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Allen, 326 U.S. at 494; Fisher v. American United Life Insurance Co., 314 U.S. 549 (1942); Pufahl v. Park's Estate, 299 U.S. 217, 226 (1936); Commonwealth Trust Co. of Pittsburgh v. Bradford, 297 U.S. 613, 618-190 (1936); Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33 (1909). State court injunctions and state statutes that prohibit federal litigation have uniformly failed. *See, e.g.*, Monogram Industries, Inc. v. Zellen, 467 F.Supp. 122, 123 (D. Mass. 1979); Mills v. Roanoke Ind. Loan & Thrift, 70 F.R.D. 448, 451 (W.D. Va. 1975); Slotkin v. Brookdale Hospital Center, 357 F.Supp. 705, 707-08 (S.D.N.Y. 1972); Weisfeld v. Spartans Industries, Inc. 58 F.R.D. 570, 577 (S.D.N.Y. 1972).

[14]Even so, the lower court read the Supreme Court's *General Atomic* decision too narrowly. In a subsequent *General Atomic* case, the Court issued a writ of mandamus to prevent the lower court from extending its injunction to forbid arbitration proceedings under Federal law. General Atomic Co. v. Felter, 436 U.S. 493 (1978).

much less distinguish this Court's holdings. Make no mistake; Alabama's claim to enjoin Federal litigation that is merely "connected with" a state proceeding and which therefore might cause some unspecified "interference" with a state proceeding establishes a new rule. If *Donovan* and *General Atomic* are to be overruled, it should be this Court, not Alabama, that should do so; for "[i]t is emphatically the province and duty of the [federal] judicial department to say what the law is,"[15] and once so declared "the Judges in every state shall be bound thereby . . . ."[16]

2. The Alabama Rule Conflicts with Lower Federal Court Decisions that Uniformly have Followed *Donovan v. City of Dallas.*

The decision below portends a state court rush away from the *Donovan* rule which the federal courts so far have declined to join. It conflicts with decisions of the Seventh Circuit and district courts in the Second and Fourth Circuits which hew faithfully to the letter and spirit of *Donovan.*

The Decision of the Seventh Circuit

In *Central States, Southeast and Southwest Areas Health and Welfare Fund v. Old Security Life Insurance Co.*, 600 F.2d 671 (7th Cir. 1979), a Missouri state court had placed an insurance company in receivership and, as here, issued an injunction restraining all persons "from prosecuting or bringing any action, . . . against the [insurance company] . . . or its properties or assets, except pursuant to the order of this court." Plaintiffs then filed an amended complaint in a pending federal action against the insurance company, alleging (pursuant to the Employee Retirement Income Security Act of 1974) that the insurance company had participated in a conspiracy to defraud the pension fund of its asssets. The district court refused to

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[15]Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). *See* Cooper v. Aaron, 358 U.S. 1 (1958). *See also* U.S. Constitution, Art III, § 1.

[16]U.S. Constitution, Art. VI.

dismiss the case on the basis of the injunction and the insurance company appealed.

The Seventh Circuit expressly refused to extend the *Donovan in rem* exception even to federal actions which "although technically in personam . . . [have] substantial *in rem* aspects." 600 F.2d at 675 n. 7. The Seventh Circuit considered *Donovan* to mean precisely what this Court's opinion said: state courts are barred from interfering with any federal *in personam* litigation, regardless of its subject matter or merits.

> If this federal action were in rem, it would present a very different situation. *Blackhawk Heating & Plumbing Co., Inc. v. Geeslin*, 530 F.2d 154 (7th Cir. 1976) involved state and federal proceedings, both in rem . . . .[17]
>
> [T]he Fund's second amended complaint seeks to enforce a personal liability and obtain a money judgment, not to obtain possession of a res. Old Security describes injunction motions by the Fund as demanding in rem relief. Nothing of record indicates that the district court granted these motions or any in rem relief. The district court is fully capable of preventing inappropriate conversion of the suit to a proceeding truly in rem.

Id.

Here, in contrast, the Alabama Supreme Court did not even search for "substantial *in rem* aspects" in petitioner's proposed

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[17]The Seventh Circuit noted, quoting the district court, that *Blackhawk Heating & Plumbing* was a situation where

> the Federal court should not simultaneously proceed with liquidation of the *res*, particularly when a domestic insurance company is involved. *However, when the Federal suit is proceeding in personam, we see no reason why we should not proceed simultaneously with the State court liquidation proceedings.*

600 F.2d at 674 (emphasis added). District courts in the Seventh Circuit of course follow *Central States. See, e.g.*, Tcherepnin v. Franz, 475 F.Supp. 92, 95-96 (N.D. Ill. 1979).

lawsuit. Here it was enough for the subject matter to be "connected" and hence to pose a fancied threat of unspecified "interference" with the receivership.

The Decision of the District Court In The Second Circuit

In *Slotkin v. Brookdale Hospital Center*, 357 F.Supp. 705 (S.D.N.Y. 1972), a New York state court had enjoined all actions against an insurance company in liquidation. (The New York statute is virtually identical to Alabama's). Plaintiffs filed a federal diversity action based on fraud committed by the company and its former employees. The district court denied the liquidator's motion to dismiss the case because of the injunction.

> This injunction would require our dismissal of the instant proceeding only if the state court requires exclusive jurisdiction to protect the *res* — the corporate assets. Thus, if two suits are *in rem* or *quasi in rem*, the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other in order "to avoid unseemly and disastrous conflicts in the administration of our dual judicial system . . . ." *But two actions may proceed simultaneously where one is in rem and the other is in personam.*

357 F.Supp. at 707 (citation omitted; emphasis added).

The federal action in *Slotkin* was as much "inextricably connected with", as much an "interference" with the state proceedings as is petitioner's proposed federal complaint. It did not even present claims for relief that may be heard only in federal court, like some of petitioner's proposed claims. But where the *Slotkin* court followed *Donovan*, the Alabama Supreme Court ignored it.

The Decision of the District Court In The Fourth Circuit

In *Mills v. Roanoke Ind. Loan & Thrift*, 70 F.R.D. 448 (W.D. Va. 1975), a Virginia state court had issued an injunction

restraining "all persons from prosecuting suits" against a company in state receivership "without first obtaining permission of the court." Plaintiffs filed suit in federal court against former employees of the company, the company itself and the receivers for violation of federal securities law. Defendants asked the court to dismiss the case or to abstain on the basis of the injunction. Noting that some of plaintiff's claims were within the exclusive jurisdiction of the federal courts, *id.* at 451, the district court denied the motion.

> . . . where one suit is *in rem*, as is the receivership proceeding in state court, and the other suit is *in personam*, it is equally well established that each court may exercise its concurrent jurisdiction independently of the other . . . . Under such circumstances, *the state court could not enjoin plaintiffs from asserting their federal causes of action.*

Id. (citations omitted; emphasis added). The court's decision could not have conflicted more squarely with the Alabama Supreme Court's: "Plaintiff's suit is *in personam*, and as noted above there is no limitation which would prohibit plaintiffs from proceeding in [the federal] forum." *Id.*[18]

3. Thirty-three States Have Anti-litigation Statutes Like Alabama's. If the Alabama Rule is Allowed to Stand as Precedent, it Threatens Broad new State-imposed Restrictions on Federal Litigation.

The national importance of the issue raised here should not be underestimated. As we have seen, similar anti-lawsuit injunctions issued in insurance company cases have been brought to federal courts from states as widespread as Missouri, New York

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[18]To the extent that *Central States, Slotkin* and *Mills* strictly follow *Donovan* and refuse to apply a state anti-lawsuit injunction to any but an *in rem* action, they also conflict with *Sumrall*. There, as we have noted, p. 6 *supra*, the Fifth Circuit considered the *Donovan* exception to include an action seeking not *in rem* but other specific injunctive relief – albeit relief that in its view would have deprived the state court receiver of "possession" of the res. 632 F.2d at 1352.

and Alabama. As we have noted, 33 states have statutes expressly proving for such injunctions in insurance receivership or liquidation cases. The National Association of Insurance Commissioners has recommended that such an injunction be issued in *every* such case, NAIC, *Model Insurance Laws, Regulations and Guidelines*, Art. I, § 5(A)(6), and its manual provides sample language that sweeps broadly, *see* App. E, pp. E3-E4. Experience in just one state, Texas, indicates that such injunctions are now routine. *See* App. E, pp. E1-E2.

Petitioner's experience (pp. 5-6 *supra*) demonstrates that even where such injunctions are so obviously overbroad as to violate the *Donovan* rule, citizens challenge them at their peril. A proliferation of statutes, the lobbying of insurance commissioners (themselves often receivers) and courts' routine issuance of injunctions at their behest promote a silent, growing encroachment on federal courts' jurisdiction (*see* 4 *infra*) and citizens' liberty (*see* 5 *infra*), making the *Donovan* rule a dead letter. Other states are sure to follow Alabama's rewrite of *Donovan* to expand its narrow allowance only of state injunctions against *in rem* suits that would disturb state court possession of property. Other states will feel free to enjoin citizens from pursuing in the federal courts their right to damages under federal statutes in cases "connected" with insurance insolvencies, liquidations or receiverships, labeling such suits "interference." They will do so, that is, unless this Court grants certiorari to review and call a halt to such practices now.

4. The Alabama Rule Impinges on the Article III Powers of Federal Courts and Deprives the Federal Courts of Jurisdiction to Determine their own Jurisdiction.

Alabama's rule threatens the independence of the federal courts. *Donovan's* prohibition of state court injunctions against federal *in personam* litigation is an "old and well-established judicially declared rule," 377 U.S. at 412-13.[19] It is based on the principle, grounded in Articles III and VI of the Constitution,

[19] *See* cases cited at *id.* 413 n.11. *See also* cases cited at n.13 *supra*.

that states are without power to curtail the jurisdiction of the federal judiciary. This Court has enforced that principle for over a hundred years, and thus states may not restrict federal courts from enforcing rights arising under state statutes,[20] or condition the right of corporations to do business within a state upon waiver of the right to sue in federal court.[21]

It is unquestionable that federal courts have exclusive authority to determine their own jurisdiction.[22] State action which has "the effect to take [the authority] away" cannot stand.[23] This Court has always viewed "the exemption of the authority from interference by legislative or judicial action of the states [as] essential to [the federal courts'] independence and efficiency."[24]

If the Alabama rule stands, the federal district court is deprived of power to "decide whether [petitioner's] case is properly before it,"[25] and, if necessary, itself to prevent "prosecution of vexatious federal proceedings."[26] For under the Alabama rule, no federal case may commence at all.

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[20]Chicago and N.W. Ry. Co. v. Whitton, 80 U.S. (13 Wall.) 86 (1871).

[21]Home Ins. Co. v. Morse, 87 U.S. 445 (1874).

[22]*See, e.g.*, United States v. United Mine Workers of America, 330 U.S. 258, 292-93 (1947); Chicago and N.W. Ry. Co. v. Whitton, 80 U.S. (13 Wall.) at 290-92; Payne v. Hook, 74 U.S. (7 Wall.) 425 (1869).

[23]*See* United States v. City of Keokuk, Iowa, 73 U.S. (6 Wall.) 518 (1868).

[24]Central Nat'l Bank v. Stevens, 169 U.S. 432, 439 (1893) (citations omitted). *Accord*, United States *ex rel.* Riggs v. Johnson Cty., 73 U.S. (6 Wall.) 166, 194 (1868).

[25]United States v. Shipp, 203 U.S. 563, 573 (1906), *quoted in* United States v. United Mine Workers of America, 330 U.S. 258, 291 (1947). *Compare* App. B ¶¶ 3, 4).

[26]General Atomic Co. v. Felter, 434 U.S. at 17. *Compare* App. B (¶ 8).

5. The Alabama Rule Unconstitutionally Abridges Petitioner's First Amendment Right to Petition the Courts for Redress of Grievances.

In simple terms, the Alabama Supreme Court's decision abridges petitioner's right to petition the federal courts for redress of his grievances.[27] The constitutional right of access to the courts is "among the most precious liberties safeguarded by the Bill of Rights,"[28] a right itself "subject to the due process protection of the Fifth Amendment,"[29] a right not merely abstract, but to be exercised at a "meaningful time and in a meaningful manner."[30] The states may not "unjustifiably obstruct . . . the right of access,"[31] even by indirect means.[32]

Absent here is the balancing consideration of protecting a state court's control and possession of property obtained pursuant to lawful process, the consideration recognized in *Donovan*. Alabama has violated and must bow to petitioner's First Amendment rights.

Alabama's action here is particularly invidious. It deprived petitioner of his sole means to vindicate rights conferred by federal statute.[33] The proposed complaint set forth claims under the Organized Crime Control Act of 1970, 18 U.S.C. § 1961 *et*

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[27]California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

[28]United Mine Workers of America v. Illinois State Bar Association, 389 U.S. 217, 222 (1967). *See also* Johnson v. Avery, 393 U.S. 483, 485 (1969); Ex Parte Hull, 312 U.S. 546, 549 (1941).

[29]In re N.C. Trading, 586 F.2d 221, 231 n.28 (Ct. Cust. and Pat. App. 1978).

[30]Armstrong v. Manzo, 380 U.S. 545, 552 (1965). *Accord*, Boddie v. Connecticut, 401 U.S. 371, 377 (1971).

[31]Procunier v. Martinez, 416 U.S. 396, 419 (1974).

[32]Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 7 (1964). *See* United Mine Workers of America v. Illinois State Bar Ass'n, 389 U.S. at 222; Boddie v. Connecticut, 401 U.S. at 379-83.

[33]As well as preventing him from pursuing federal constitutional rights under the civil rights acts, App. C pp. C10-11, cognizable in both state and federal courts. Martinez v. California, 444 U.S. 277 (1980). *See* Allen v. McCurry, 449 U.S. 90 (1980); Maine v. Thiboutet, 448 U.S. 1, 11 (1980); Monroe v. Pape, 365 U.S. 167, 183 (1961).

seq., and the Sherman Act, 15 U.S.C. § 4. The federal courts have exclusive jurisdiction of these claims.[34] Alabama has prevented petitioner from asserting these federal rights at all,[35] has denied him a "reasonable opportunity" to resort to the courts,[36] has barred him from "the only forum effectively empowered to settle their disputes."[37] As this court holds, "[t]he right to petition the courts cannot be so handicapped."[38]

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[34]18 U.S.C. § 1964; 15 U.S.C. § 4; Freeman v. Bee Machine Co., 319 U.S. 448, 451 n.6 (1943); General Investment Co. v. Lake Shore & Michigan Southern Rye Co., 260 U.S. 261, 287 (1922); Hand v. Kansas City Southern Rye Co., 55 F.2d 712 (S.D.N.Y. 1931); Vaughn & Co., Ltd. v. Saul, 237 S.E.2d 622 (1977). *See also* Wilder Manufacturing Co. v. Corn Products Co., 236 U.S. 165, 174-75 (1915), *quoting* Farmers' & M. Nat. Bank v. Dearing, 91 U.S. 29, 35 (1875).

[35]*See* Hupfeld v. Automation Piano Co., 55 F.2d 788 (C.C.S.D.N.Y. 1895), *reaff'd in* Merrill, Lynch, Fenner & Smith v. Cavichia, 311 F.Supp. 149 (S.D.N.Y. 1970). *Compare* Fischer v. New York Stock Exchange, 408 F.Supp. 745, 750 n.4 (S.D.N.Y. 1976) (". . . requirement of prior leave to sue a receiver does not apply where . . . the subject of the suit is one over which the federal court has exclusive jurisdiction").

[36]Procunier v. Martinez, 416 U.S. at 419.

[37]Boddie v. Connecticut, 401 U.S. at 376.

[38]Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. at 7. And *see* Mills v. Roanoke Ind. Loan & Thrift, 70 F.R.D. at 451, in which the federal district court faced the identical situation and declined to apply a similar injunction to exclusively federal causes of action under the Securities Act of 1934;

> There is no question as to plaintiffs' substantial federal rights to seek such relief in this court. As to the alleged violations of the 1933 Act, this court has concurrent jurisdiction with the state courts, 15 U.S.C. § 77v, and *the alleged violations of the 1934 Act are within the exclusive jurisdiction of this court,* 15 U.S.C. § 78aa. Plaintiff's suit is *in personam,* and as noted above there is no limitation which would prohibit plaintiffs from proceeding in this forum.

(emphasis added).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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